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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1948

No. 715

Roy C. Tinsley,

Petitioner

vs

The State of Texas

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF TEXAS SITTING AT AUSTIN, TEXAS.

Kenneth Lawing,
110 East Fifth Street
Borger, Texas
ATTORNEY FOR PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1948

No._____

Roy C. Tinsley,
Petitioner

vs.

The State of Texas,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF TEXAS SITTING AT AUSTIN, TEXAS

To the Honorable Supreme Court of the United States:

Roy C. Tinsley, petitioner, prays that a writ of certiorari issue to review the judgment and stay execution of sentence of the Criminal Court of Appeals of the State of Texas, which is the highest court of said State to herein determine and to pass upon all questions involved as presented to the court, and as rendered and entered on the 26th day of November, 1947, confirming the conviction of petitioner, Roy C. Tinsley, for violation of Article 524 of the Revised Penal Code of the State of Texas, prohibiting the unnatural act of sexual intercourse, to-wit, sodomy, for which he was sentenced to the State Penitentiary at Huntsville, Texas, for a period of two years on a judgment and sentence of the District Court of Hutchinson County, Texas.

II.

Before announcing ready for trial, and before the jury was selected to try the petitioner in the District Court of Hutchinson County, Texas, he filed his motion to the court praying for the court to quash the indictment and dismiss the jury panel as selected to try him, because the grand jury which returned the indictment against him in Hutchinson County, Texas, was composed solely of

men, and the jury panel which was selected by the court, or under the direction of the court to try him, likewise was composed solely of men.

III.

The opinion of the District Court of Hutchinson County, Texas dated March 17, 1947, in overruling the motion to quash filed to the court by this petitioner appears at page 8, and marked Exhibit "A", and the opinion of the Criminal Court of Appeals of Texas appears at page 9, Marked Exhibit "B", to which opinion the petitioner filed his motion for rehearing, which was overruled by the court unanimously without further opinion.

IV.

The petitioner, after his motion for rehearing was overruled, attempted to file his motion with the Clerk of the Criminal Court of Appeals at Austin, Texas to stay the execution of judgment and sentence, which the Criminal Court of Appeals of Texas refused to consider said motion, and instructed the State's Attorney before said court to inform petitioner's attorney that the court did not consider there is a Federal question presented to the court, which letter of the State's Attorney is found on page 11, and marked Exhibit "C", and returned said motion to petitioner's attorney.

V.

The opinion of the Criminal Court of Appeals of Texas as delivered on December, 3, 1947, used this language, "Women are not permitted under the constitutional laws of Texas to serve on juries, and in the event any woman should have been on the grand jury, it would be necessary for this court to quash the indictment." Then, in the State's Attorney letter as set out elsewhere herein, states on behalf of the court that there is no Federal question involved.

JURISDICTION

The jurisdiction of this court is invoked under Section 237 (b) of the United States Judicial Code as amended February 13, 1925, 43 Stat. 937, 28 U.S.C. 344 B; the Preamble of the Constitution of the United States as a means of securing to the individual

citizen proper consideration of his rights by those in power running the Government. Petitioner further contending, that his civil and political rights were granted him under the First, Sixth and Fourteenth Amendments of the United States Constitution, and previous decisions of the Supreme Court of the United States in the construction placed upon same, were violated, and that Article V, Section XIII of the Constitution of the State of Texas, which is as follows:

"Grand and petit juries in the District Courts shall be composed of twelve men, etc," and that Article 578, Title VIII of the Revised Code of the Criminal Procedure of the State of Texas provides as follows:

"In the District Court, the jury shall consist of twelve men; in the county court and inferior courts, the jury shall consist of six men," are both in violation of petitioner's rights as made and guaranteed to him under the Constitution of the United States as above stated, that is to say, and he contends that the Constitution of the State of Texas, and the statutory enactments, disqualifies and makes incompetent one-half of the available jury population of the State of Texas, in that it disqualifies by Constitutional and statutory prohibition, one-half of the white race, to-wit, white women, and one-half of the colored race, to wit, colored women, each being one-half of the representative citizenship of their respective races, and each constituting a group of one-half of their respective races.

The petitioner in his motion to quash expressly raised this question before the District Court of Hutchinson County, Texas, and claimed that same was in violation of his Constitutional rights as made and provided for under the Constitution of the United States, and was a denial to him of his rights to have a jury selected from a representative cross-section of the citizenship of Hutchinson County, Texas, the trial court expressly considered and overruled the motion to quash the indictment and jury panel over the objections of the petitioner, and the Criminal Court of Appeals, to which petitioner then excepted to the rulings of the court;

that further the Criminal Court of Appeals of Texas, likewise overruled same, stating that there is no Federal question involved.

The following cases among others sustains the jurisdiction of this court as to the exclusion of women as a group, as a class, or as a race from juries solely because of such facts: **Ballard v. United States,** which decision was rendered and handed down by this court, December 8, 1946, in which this court used this language, "Congress had provided that jurors in federal courts shall be the same qualifications as those of the highest court of law in the State," **this provision also provides to grand, as well as petit juries.** Congress has also prohibited disqualifications of citizens from jury service on account of race, color or previous condition of servitude. It has required that jurors shall be chosen without reference to party affiliation. It has provided that jurors shall be returned from such parts of the district as the court may direct, so as to be most favorable to an impartial trial, and so as not to included an unnecessary expense, or unduly burden the citizens of any part of the district. None of the specific exemptions which it has created is along sex lines, these provisions reflect a design to make a jury a representative cross-section of the community and truly representative of it. We cite also **Patton v. State of Mississippi,** which was decided by this court on December 8, 1947, in which this court used this language, "Sixty-seven years ago this court held that future exclusion of negroes from grand and petit juries, solely because of their race, denied negro defendants in criminal cases the equal protection of the laws required by the Fourteenth Amendment." Petitioner is a white male, but nevertheless he raises a question that both negroes and white women were excluded from the grand jury which indicted him, and the petit jury which convicted him, and we see no reason why the State of Texas can exclude one-half of the available jury population, approximately two million people, regardless of whether they are negroes or whites, and regardless of whether they may be classed as a group, or as a race, either

way would bring the same results and same exclusion. We further quote from this decision, "A long and unbroken line of our decisions since then has reiterated that principle, regardless of whether the discrimination was embodied in statute (this being in the Constitution of the State of Texas and also statutory enactments), or was apparent from the administrative practices of state jury selection, and regardless of whether the system is depriving defendants of their rights was "ingenious or ingenuous." We further quote from this decision from this court, **"When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of negroes, or any racial group, indictments and verdicts returned against them by juries thus selected cannot stand."**

STATEMENT OF THE CASE

Roy C. Tinsley was a white man about 30 years old, and was indicted by a Hutchinson County, Texas grand jury on the 23rd day of October 1946, and charged with the offense of sodomy, was convicted of the offense and given two years in the State Penitentiary, which conviction he appealed to the Criminal Court of Appeals of Texas, which conviction was affirmed by the Criminal Court of Appeals on the 3rd day of December, 1947, and overruled the defendant's, Roy C. Tinsley, motion to quash the indictment on said date.

ERRORS BELOW RELIED UPON

It is the contention of appellant that the Constitution of Texas in disqualifying both the white women and colored women of the State of Texas from sitting on grand juries and petit juries is in violation of petitioner's constitutional rights to a fair and impartial jury as guaranteed to him under the Constitution and laws of the United States, to-wit, the Preable of the Constitution, the Fifth, Sixth and Fourteenth amendments of the Constitution of the United States, and that the court below erred in not sustaining his motion to quash the indictment, because of the exclusion of

all the white women of his county, and all the colored women of his county.

FACTS IN SUPPORT OF ERRORS

There is no statement of facts in connection with this, relied upon as the constitutional article of the State of Texas, or the satutory article as set out elsewhere in this petition, being purely a question of law by this court to pass upon.

QUESTIONS PRESENTED

1. Is Article V, Section XIII of the Constitution of the State of Texas, wherein and whereby it disqualifies and makes incompetent one-half of the citizenship of the State of Texas for grand jury and petit jury in the State of Texas?

2. Likewise is Article 578, Title VIII of the Revised Code of the Criminal Procedure of the State of Texas in violation of the Constitution of the United States and this defendant's rights wherein and whereby it disqualifies and makes incompetent one-half of the citizenship of the State of Texas for grand jury and petit jury in the State of Texas?

3. Can an indictment and conviction be sustained where and when one-half of the available jury population is by law excluded from grand jury and petit jury service?

4. Is it in violation of the Preamble of the Constitution of the United States, the due process laws of the Fifth Amendment, the impartial jury clause of the Sixth Amendment, and the Fourteenth Amendment of the Constitution of the United States, prohibiting legislation or discrimination against races or groups?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the District Court of Hutchinson County, Texas in refusing to grant petitioner's motion to quash the indictment as returned against him by the grand jury of Hutchinson County, Texas, composed of only men, and the jury selected to try him by the District Court of Hutchinson County, Texas, selected by only men; petitioner contends it deprived him of a fair and

impartial jury as granted to him under the Constitution of the United States, and has been defined in the decision of this court, particularly by the decision of this court in Glassor vs. U. S. 315 U. S. 600; **Edna W. Ballard and Donald Ballard vs. U. S.**, which opinion was rendered by this court on December 9th, 1946, and the opinion of this court as rendered by Mr. Justice Black on December 8, 1947 in the case of **Eddie (Buster Patton, petitioner vs. the State of Mississippi in which the court used this language.** "When a jury selection plan whatever it is, OPERATES IN SUCH A WAY AS TO RESULT IN THE COMPLETE AND LONG CONTINUED EXCLUSION OF ANY REPRESENTATIVE AT ALL FROM A LARGE GROUP OF NEGROES, OR ANY OTHER RACIAL GROUP, INDICTMENTS and VERDICTS RETURNED AGAINST THEM BY JURIES THUS SELECTED CANNOT STAND."

Wherefore, it is respectfully submitted that this petitioner have a writ of certiorari granted, and that the Criminal Court of Appeals of the State of Texas be by this court ordered to stay execution and sentence until said cause was passed upon by this Honorable Court.

KENNETH LAWING,
ATTORNEY FOR PETITIONER
110 East Fifth Street
Borger, Texas

2-16-48

STATE OF TEXAS	NO. 1272	IN THE DISTRICT COURT
VS	)(	HUTCHINSON COUNTY
ROY C. TINSLEY	)(	TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, Roy C. Tinsley, the defendant in the above entitled and numbered cause, and after having been arraigned before the court for trial, that said trial having been set for March 17th, A.D. 1947 at 10:00 AM, and before having announced ready for trial, files this his motion to the court, praying the court to dismiss the indictment as filed herein, and likewise to dismiss the jury which has been subpoenaed under the direction of the court to try the defendant herein, for the following reasons:

— 1 —

That said Grand Jury and said Special Venire or Petty Jury which make up the Special Venire that is selected and impaneled herein was not drawn and is not drawn from a cross-section of the citizenship of Hutchinson County, Texas as contemplated by the Constitution of the United States, and Bill of Rights for the reason that one-half of the citizenship in and for Hutchinson County, Texas are by practice, and statutory enactment in this county excluded and denied jury service, to-wit: all women of Hutchinson County, Texas, are now and have been excluded from Grand Jury and Petty Jury service the organization of the county, that to excluded them by statute, legislation or otherwise is to disqualify one-half of the available population in Hutchinson County, Texas for Grand Jury and Petty Jury service; that said exclusion by statute, legislation or otherwise is class or group distinction and discriminatory legislation against the rights of this defendant, that is in its self class and group distinction and abhorent to the democratic ideals of the trial by jury. (McNabb vs United States, 318, U. S. 332; Thiel vs Southern Pacific Co. 328 U. S.; Ballard vs. U. S., October Term, 1946; Supreme Court of U. S.).

— 8 —

— 2 —

This defendant would further allege and show unto the court that such practice and procedure and the selecting of a Grand Jury and Petty Jury is contrary to the fairness and competence of the jury system as announced and promulgated by democratic ideals of trial by jury as set forth by the Constitution of the United States, and the Bill of Rights, that jury competence is an individual rather than a group or class matter, as herein alleged and set forth and that such systematic exclusion of women from the Grand Jury and Jury Panel in this case is and was a departure from the scheme of jury selection which the Congress of the United States has adopted and is against and not supported by proper administration of Justice in a democracy. That it is a denial of that cherished Constitutional phrase "THAT ALL MEN ARE CREATED FREE AND EQUAL," that men in Texas alone assume the position of indictor, and jury in dispensing Civil and Criminal Justice, women being relegated to, as an onlooker, and inferiorated and ostracized from the juries of both Civil and Criminal cases, under the law of the State of Texas, and denies the right to them given a male citizen of the colored race. (Texas Con. Art V., Sec. 13; Art V 333, CCP).

— 3 —

This defendant would further show and allege unto the court that "IF THE SHOE WERE ON THE OTHER FOOT", that is, if all men were excluded from the Grand Juries and Petty Juries of Hutchinson County, Texas, that certainly this court would not hold that same was truly representative of the cross-section of the county or community, if all men were intentionally and systematically excluded from the Grand Juries and Petty Juries of Hutchinson County, Texas, and that the exclusion of women from Grand Juries and Petty Juries may indeed make the jury system less representative of cross-section of the community, then it would be if an economic or racial group were excluded. (Ballard vs United State, Supreme Court, October term 1946).

WHEREFORE, this defendant prays that said indictment be dismissed and likewise, said Special Venire be dismissed as both are against the constitutional rights of this defendant and in violation of the democratic ideals of trial by jury.

Roy C. Tinsley
DEFENDANT

/s/ H. M. Hood

Sworn and subscribed to before me, this the 17th day of March, 1947.

3-15-47

H. M. Hood, Attorney for Defendant
107 East Sixth Street
Borger, Texas
(Seal)

Mrs. Wallace Kelley
District Clerk
Hutchinson County,
Texas

THE STATE OF TEXAS)(
COUNTY OF HUTCHINSON)(

I, MRS. WALLACE KELLEY, Clerk of the 84th. Judicial District Court, in and for Hutchinson County, Texas, do hereby certify that the above and foregoing is a true and correct copy of MOTION TO QUASH INDICTMENT, filed in Cause No. 1272 STATE OF TEXAS VERSUS ROY C. TINSLEY, on March 17, 1947.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, AT Office in Stinnett, Texas, this the 17th day of February, A. D. 1948.

Mrs. Wallace Kelley
Clerk, 84th. Judicial District
Court, in and for Hutchinson
County, Texas

(Seal)

STATE OF TEXAS No. 1272 IN THE DISTRICT COURT
VS. OF HUTCHINSON COUNTY,
ROY C. TINSLEY TEXAS

On this the 17th day of March, A. D. 1947 in the above entitled and numbered cause came on for hearing the motions of the defendant, Roy C. Tinsley, to dismiss the indictment as filed herein and after the court having heard and considered said motion, it is of the opinion that said motion should be in all respects be overruled by the court.

It is therefore accordingly Ordered, Adjudged and Decreed that said motion is in all respects overruled and denied by the court, to which overruling of said motion the defendant then and there in open court accepted to the ruling of the court.

Jack Allen
JUDGE PRESIDING

3-18-47

THE STATE OF TEXAS
COUNTY OF HUTCHINSON

I, MRS. WALLACE KELLEY, Clerk of the 84th. Judicial District Court, in and for Hutchinson County, Texas, do hereby certify that the above and foregoing is a true and correct copy of ORDER OVERRULING MOTION TO QUASH INDICTMENT, entered in Cause No. 1272, THE STATE OF TEXAS Versus Roy C. Tinsley and shown of record in Volume 3, Page 269 Criminal Minutes, District Court Hutchinson County, Texas.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, At Office in Stinnett, Texas, this the 17th day of February, A. D. 1948.

Mrs. Wallace Kelley
Clerk District Court
(seal) Hutchinson County, Texas

EXHIBIT "B"

ROY C. TINSLEY, Appellant)(
No. 23,825)(From Hutchinson County
THE STATE OF TEXAS, Appellee)(

O P I N I O N

Appellant was assessed a penalty of two years in the penitentiary by a jury on a charge of sodomy.

The statement of facts in the case is not approved by the trial judge and, consequently, cannot be considered. The action of the trial judge in refusing to approve the statement of facts, because the same was not filed within the allowed by law, is commended.

In the state of the record there is but one question presented for our consideration. A motion was filed to quash the indictment on the ground that there were no women on the grand jury which returned the indictment. A similar motion was directed to the panel from which the petit jury was selected. We find presented quite an interesting argument on the subject, however, this need not be discussed by us. Women are not permitted under the Constitution and laws of Texas to serve on juries and in the event any women should have been on the grand jury it would be necessary for this Court to quash the indictment. Harper v. State, 234 S. W. 909.

Finding no reversible error, the judgement of the trial court is affirmed.

Beauchamp, Judge

(Delivered December 3, 1947.)

EXHIBIT "C"

ROY C. TINSLEY, Appellant)(
No. 23,825)(From Hutchinson County
THE STATE OF TEXAS, Appellee)(

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

Comes now Roy C. Tinsley, the appellant in the above entitled and numbered cause, and files this his application to the court for stay of execution for the reason that he desires, and he has made an application to the Supreme Court of the United States for a writ of certiorari to this court, wherein and whereby he is seeking to have the Supreme Court of the United States to pass upon:

I.

The question submitted to this court of the District Court below, to-wit, Article V, Section VIII of the Constitution of the State of Texas, prohibiting women from sitting on grand juries and petit juries.

II.

To pass upon Article 578 of Title VIII of the Revised Code of Criminal Procedure of the State of Texas provides as follows: "In the District Court, the jury shall consist of twelve men; in the county court and inferior courts, the jury shall consist of six men."

III.

That he attaches hereto a copy of his application for writ of certiorari to the Supreme Court of the United States, and verily believes he has a question in which the Supreme Court of the United States will take jurisdiction of for good cause shown.

WHEREFORE, for the above reasons appellant prays that execution in this matter be stayed until same shall be heard by the Supreme Court of the United States.

H. M. HOOD
107 East Sixth Street
Borger, Texas
Attorney for Appellant

EXHIBIT "C"

Office of

STATE'S ATTORNEY

Ernest S. Goens Court of Criminal Appeals
State's Attorney

Austin

February 6, 1948

Mr. H. M. Hood,
Attorney at Law,
107 East Sixth Street
Borger, Texas.

Re: Roy C. Tinsley v. State, in the
Court of Criminal Appeals, No. 23825:

Dear Sir:

The Court of Criminal Appeals today declined to enter an order staying the execution of the mandate in the above-entitled and -numbered cause, as requested by you in your letter of February 2, 1948, addressed to the Clerk of the Court of Criminal Appeals at Austin, Texas.

I was requested by the Court to advise you of the action taken, and to return to you the instruments which you forwarded to the Clerk of the Court of Criminal Appeals.

The Court, in reaching its decision, considered there was no Federal question presented, and decided that if you considered that you had a Federal question in this case, that you should apply direct to the U. S. Supreme Court for an order to stay the issuance of the mandate in order for you to present your petition for writ of certiorari.

Very truly yours,

/s/ Ernest S. Goens.

Ernest S. Goens,
State's Attorney

encl.

THE STATE OF TEXAS
TO THE DISTRICT COURT OF HUTCHINSON COUNTY—GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 3 day of December A. D. 1947, this cause upon appeal to revise or reverse your Judgement between Roy C. Tinsley, Appellant, No. 23825, vs. THE STATE OF TEXAS, Appellee, was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment. It is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS IN this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the Hon. F. L. Hawkins, Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 23 day of January A. D. 1948.

Olin W. Finger
Clerk.

THE STATE OF TEXAS)(
COUNTY OF HUTCHINSON)(

I, MRS. WALLACE KELLEY, Clerk of the 84th Judicial District Court, in and for Hutchinson County, Texas, do hereby certify that the above and foregoing is a true and correct copy of MANDATE, FROM THE COURT OF CRIMINAL APPEALS, issued on the 23rd day of January, A. D. 1948, in Cause No. 1272, THE STATE OF TEXAS vs. Roy C. Tinsley, as the same is shown on file among the papers in said Cause.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, At Office in Stinnett, Texas, This the 12th day of February, A. D. 1948.

Mrs. Wallace Kelley
Clerk, 84th Judicial District
Court, in and for Hutchinson
County, Texas

(Seal)